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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 133

R. H. STEARNS COMPANY, BOSTON, MASSACHUSETTS, PETITIONER

v.

THE UNITED STATES

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court below (R. 4–13) is reported in 2 F.Supp. 773.

JURISDICTION

The judgment of the court below was entered March 13, 1933. (R. 13.) A motion to modify the opinion was overruled May 8, 1933. (R. 13.) The petition for a writ of certiorari was filed June 7, 1933 (R. 14) and was granted October 9, 1933. (R. 15.) The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the taxpayer may recover the amount of taxes credited pursuant to a claim for credit which it filed, on the ground that the formal entry of the credit was made after the expiration of the statutory period for collecting the tax.

2. If the taxpayer may object to the validity of the credit, whether a waiver filed on February 19, 1923, but signed by the Commissioner on April 7, 1930, was valid to permit the Commissioner to make the credit on June 28, 1924.

3. Whether, in the circumstances of this case, the petitioner may recover the amount of an alleged illegal credit as upon an account stated.

STATUTES INVOLVED

The statutes involved are set out in Appendix A, *infra,* pp. 23–25.

STATEMENT

The findings of fact of the Court of Claims (R. 4–7) may be summarized as follows:

On September 29, 1917, the petitioner filed its income and profits tax returns for the fiscal year ending July 31, 1917. (R. 4.) Certain additional assessments were made against the petitioner for the year 1917 and were paid. (R. 4.) The petitioner filed its income and profits tax return for the fiscal year ending July 31, 1918, on October 29, 1918, and an additional return for the same year on June 19, 1919, and the tax shown due on such returns was duly assessed and paid. (R. 4–5.)

On February 19, 1921, the petitioner filed a waiver of assessment for the year 1917, which was approved by the Commissioner on February 6, 1923. (R. 5.) This waiver expired April 1, 1924. (R. 5.)

On February 19, 1923, the petitioner filed a waiver of assessment and collection for the years 1917 and 1918, extending the period to March 1, 1925. (R. 5.) The Commissioner's signature to this waiver was subscribed by an authorized officer on April 7, 1930. (R. 6.) On April 7, 1930, the Commissioner of Internal Revenue was Robert H. Lucas, and his term as Commissioner extended from June 1, 1929, to August 15, 1930. (R. 6.)

In June, 1923, the Commissioner made an additional assessment against the petitioner for the fiscal year ending July 31, 1917, and signed and certified this assessment on June 26, 1923. (R. 6.) On the attached assessment list, a notation opposite the item pertaining to the petitioner contained the word "Waiver." (R. 6.) No proof was offered as to what particular document the word "waiver" referred. (R. 6.) The additional assessment for 1917 was reduced by a credit of an overassessment for the year 1916 and, as reduced, amounted to $20,757.14. Payment of it was demanded by the Collector on August 3, 1923. (R. 6.)

On August 9, 1923, the petitioner filed a claim for refund and credit of income taxes alleged to have been overpaid for the fiscal years ending July 31, 1918, 1919, 1920, and 1921, in a total amount of $35,727.10, asking that the unpaid balance for the

fiscal year ending July 31, 1917, be set off against the claim for overpayment, and that the remainder, $14,969.96, be refunded. (R. 6.) At that time it was the practice of the Collector's office to treat such a claim as a stay of collection of unpaid taxes against which the credit was asked, until the Commissioner had considered and adjusted the claim. (R. 6.)

On March 1, 1924, the Commissioner approved a schedule of overassessments which showed an overassessment in favor of the petitioner for the fiscal year ending July 31, 1918, in the amount of $14,928.07 and sent this schedule to the Collector for his action in accordance with directions appearing thereon. (R. 6–7.) After complying with the Commissioner's instructions, the Collector signed and returned the schedule to the Commissioner, together with a schedule of refunds and credits certifying the application of $14,928.07 as a credit. (R. 7.) The Commissioner signed the schedule of refunds and credits on June 28, 1924, and transmitted to the petitioner a certificate of overassessment of the above amount for the fiscal year ending July 31, 1918. (R. 7.) The overassessment for the fiscal year ending July 31, 1918, applied as a credit, reduced the liability of the petitioner for the fiscal year ending July 31, 1917, to $5,829.07. (R. 7.) This last amount was paid, with accrued interest, on September 15, 1924. (R. 7.)

On May 16, 1930, the petitioner filed claims for refund for the fiscal years ending July 31, 1917, and

1918, each in the amount of $14,928.07, on the ground that these amounts had been illegally assessed and illegally collected after the statutory period of limitation, and at a time when there were no valid waivers on file with the Commissioner. (R. 7.)

This suit was begun by a petition filed in the court below on May 20, 1930. (R. 1.) The court dismissed the petition. (R. 13.)

SUMMARY OF ARGUMENT

I

The taxpayer may not object to the credit which was made pursuant to its claim for credit; the validity of the waivers is immaterial. The legal effect of the filing of a claim for credit, we contend, is that the credit which the taxpayer asks may be made at any time without regard to the statutory period of limitation against collection by distraint or proceedings in court. The collector's notice and demand in this case on August 3, 1923, would plainly have resulted in a timely collection of the tax, by distraint if necessary, if the petitioner had not promptly filed its claim for credit. The petitioner's claim for credit required examination of its returns for four separate years, a matter which would obviously require a considerable amount of time. The taxpayer plainly contemplated that the Commissioner would consider these returns thoroughly and not precipitately. The petitioner secured the benefit which it sought of not being forced

to pay in cash, under distraint or other proceedings to collect the tax, and it should not now be heard to claim that the Commissioner ought not to have relied on its action and should have declined to accord it the benefit.

The position of the taxpayer here is not materially different, we submit, from that of the taxpayers in several other cases who have been denied recovery where, through the filing of a claim for credit or otherwise, they induced the Commissioner to delay the collection of the tax until after the statutory period. *Naumkeag Steam Cotton Co.* v. *United States,* 2 F.Supp. 126 (C.Cls.); *Daube* v. *United States,* 75 C.Cls. 633, affirmed on another point, 289 U.S. 367; *Ralston Purina Co.* v. *United States,* 75 C.Cls. 525, certiorari denied, 289 U.S. 732; *Backus* v. *United States,* 75 C.Cls. 69, certiorari denied, 288 U.S. 610.

II

If the petitioner may object to the validity of the credit made pursuant to its claim for credit, then the question of the validity of the waiver filed February 19, 1923, arises. The petitioner having secured the benefit of the Commissioner's reliance upon the validity of this waiver is estopped, we submit, from attacking it.

The objection made is that the Commissioner did not sign the waiver until April 7, 1930, and that this renders it invalid. But the Commissioner's signing and certification of the additional assessment

for 1918 contained a notation that there was a waiver, and we contend that this satisfied the requirement that the Commissioner consent in writing. The signature of the Commissioner and the taxpayer need not appear on the same document. We contend, finally, that the Commissioner's signature is not essential to the validity of a waiver and that, even if it is, there is no requirement that the Commissioner must sign within any specified time. The waiver is not rendered void because the signature was tardy.

III.

The petitioner failed to pursue its remedies under the revenue laws and brings this action upon an account stated. But the account shows no balance struck in favor of the petitioner and thus fails to meet the test of an account stated. The ruling in *Bonwit Teller & Co.* v. *United States,* 283 U.S. 258, is not to be extended to such a case.

ARGUMENT

I

THE TAXPAYER MAY NOT OBJECT TO THE CREDIT MADE PURSUANT TO THE CLAIM FOR CREDIT WHICH IT FILED, AND THE VALIDITY OF THE WAIVERS IS IMMATERIAL

The assessment of additional taxes for the fiscal year ending July 31, 1917, was validly made on June 26, 1923, while the petitioner's first waiver was in full effect, and after the petitioner had filed

its second waiver with the Commissioner. On August 3, 1923, the collector demanded payment of the sum of $20,757.14 due under this assessment. (R. 6.) Six days later, on August 9, 1923, and obviously in order to prevent the collector from enforcing his demand for payment, the taxpayer filed a claim for refund and credit of income taxes alleged to have been overpaid for the fiscal years ending July 31, 1918, 1919, 1920 and 1921 in a total amount of $35,727.10, asking that the unpaid balance for the fiscal year ending July 31, 1917, be set off against the claim for overpayment, and that the remainder, $14,969.96, be refunded. (R. 6.) At that time it was the practice of the collector's office to treat such a claim as a stay of collection of unpaid taxes against which the credit was asked, until the Commissioner had considered and adjusted the claim. (R. 6.) On March 1, 1924, while the first waiver was still in full effect, the Commissioner approved a schedule of overassessment which showed an overassessment in favor of the petitioner for the fiscal year ending July 31, 1918, in the amount of $14,928.07. (R. 6–7.) The collector certified the application of this sum as a credit and the Commissioner signed the schedule of refunds and credits on June 28, 1924. (R. 7.) It is the amount so credited which the petitioner seeks to recover here in a suit which was not brought until nearly six years after the date of the credit.

We submit that the legal effect of the filing of a claim for credit is that the credit which the tax-

payer asks may be made at any time without regard to the statutory period of limitation against collection by distraint or proceedings in court. The effect of the claim for credit, we submit, was the equivalent of a statement by the taxpayer to the Commissioner that "We accept your determination that $20,757.14 is still due on account of our taxes for the fiscal year ending July 31, 1917. It is unnecessary for you to collect this sum, however, as we have already paid it in the form of overpayments for other years. You are authorized and requested to make the necessary bookkeeping entries to show that the amounts assessed for 1917 have already been paid and you may reduce the refund due us for the other years accordingly."

The collector's notice and demand on August 3, 1923, would plainly have resulted in a timely collection of the tax, by distraint if necessary, if the petitioner had not promptly filed its claim for credit. Under the practice of the collector's office, this claim operated as a stay of collection of the 1917 taxes until the Commissioner had had an opportunity to consider the claim. The petitioner gave plain indication of its complete understanding of the whole course of events by subsequently paying without protest $5,829.07 of the tax not covered by the credit which the Commissioner allowed (R. 7), and by accepting the entire transaction without question until nearly six years after it had occurred.

That the taxpayer intended when it filed its claim for credit that the formal bookkeeping entry could be made after the statutory period for collection by distraint or proceeding in court had expired is emphasized by the fact that at the time the claim for credit was filed there was no provision of law prescribing the time within which a credit must be made. Section 250 (d) of the Revenue Act of 1921 (*Infra*, p. 23) provided that "no suit or proceeding for the collection" of taxes should be begun after five years after the return was filed. But this provision did not refer specifically to credits, and, we submit, was not broad enough in its terms and was not intended to prescribe a limitation on the time within which a credit might be made. There was, therefore, no statutory provision in effect when the claim for credit was filed limiting the time within which the credit had to be made, and the taxpayer must have contemplated, therefore, that the credit asked for might be made by the Commissioner without regard to the limitation period prescribed for the beginning of suits and other proceedings.

The petitioner's claim for credit required the examination of its returns for four separate years, a matter which would obviously require a considerable amount of time. The taxpayer plainly contemplated, we submit, that the Commissioner would consider these returns thoroughly and not precipitately. There was nothing in the petitioner's conduct nor in the claim for credit itself to show that

the petitioner intended to settle its tax accounts by means of the requested credit only if the Commissioner finally determined the amount of the overpayments to be credited within the rapidly expiring period for collection.[1] The petitioner secured the benefit which it sought of not being forced to pay in cash, under distraint or other proceedings to collect the tax, and it should not now be heard to claim that the Commissioner ought not to have relied on its action and should have declined to accord it the benefit.

The position of the taxpayer here is not materially different, we submit, from that of the taxpayers in several other cases who have been denied recovery where, through the filing of a claim for credit or otherwise, they induced the Commissioner to delay the collection of the tax until after the statutory period. *Naumkeag Steam Cotton Co.* v. *United States,* 2 F.Supp. 126 (C.Cls.); *Daube* v. *United States,* 75 C.Cls. 633, affirmed on another

[1] The petitioner's original unlimited waiver was made to expire on April 1, 1924, by the Commissioner's Mimeograph 3085 (II-1 Cumulative Bulletin 174), which was promulgated April 11, 1923, before the taxpayer's claim for credit was filed. If the petitioner's argument that the Commissioner intentionally refrained from signing the second waiver because he did not desire it to go into effect is valid, then the Commissioner understood when the claim for credit was filed that the time for collection expired April 1, 1924, less than ten months after the claim for credit was filed. If, on the other hand, the Commissioner accepted the second waiver and relied on it, as we contend below, then the credit was made before the expiration of the limitations period.

point, 289 U.S. 367; *Ralston Purina Co.* v. *United States,* 75 C.Cls. 525, certiorari denied, 289 U.S. 732; *Backus* v. *United States,* 75 C.Cls. 69, certiorari denied, 288 U.S. 610. Cf. *Dickerson* v. *Colgrove,* 100 U.S. 578, 580–581.

The petitioner may contend that the credit here was invalid even though made pursuant to its claim for credit, because after the transaction involved, Sections 607 and 609 of the Revenue Act of 1928 (*infra,* pp. 24–25) were enacted. So far as pertinent, they provide in substance that a credit against a liability at a time when collection is barred shall be void. But these sections, we submit, refer only to credits made by the Commissioner on his own motion and were not intended to invalidate credits already made pursuant to the express request of the taxpayer. There is nothing in these provisions indicating that Congress intended to make the rules of equitable estoppel inapplicable to credits and, of course, it is quite as unconscionable for the petitioner to seek to repudiate the consequences of its conduct on the theory that the credit made was void, as it would be if the attack were based on the ground that the credit was merely untimely. There seems to be no more reason for applying these statutory provisions to invalidate the credit here than in the cases cited above.

Whether the second waiver in this case was valid or not, therefore, we contend that the credit made by the Commissioner was proper, since it was

made pursuant to an express claim for credit filed by the taxpayer. If this position is not correct, then we contend below that the second waiver filed by the taxpayer was valid and that the credit was accordingly made before the expiration of the statutory period.

II

THE SECOND WAIVER FILED BY THE TAXPAYER WAS VALID ALTHOUGH THE COMMISSIONER DID NOT SIGN IT UNTIL APRIL 7, 1930

The disputed waiver in this case was filed by the petitioner on February 19, 1923, before the expiration of a prior waiver admittedly valid. The new waiver expired by its own terms on March 1, 1925, and was not signed by the Commissioner until April 7, 1930. Section 506 (b) of the Revenue Act of 1928 (*infra*, pp. 23–24) provides that a waiver executed after the period of limitation is valid if entered into before January 1, 1929. The petitioner contends that this provision renders the waiver invalid and that the petitioner is entitled to recover the amount credited against its 1917 taxes,[2] since the credit was made after the period of limitation, as extended by the first waiver, had expired.

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[2] Petitioner also relies upon Section 1106 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 113 (U.S.C.App., Title 26, Sec. 1249 (a)), repealed as of the date of its passage by Section 612 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875. If the waiver in dispute is to be judged as of the date when it was signed by the Commissioner, concededly it is invalid under Section 506 (b) of the 1928 Act, and the application of Section 1106 (a) of the 1926 Act need not be considered.

We submit that the petitioner is estopped to assert the invalidity of the waiver in order to recover the amount of the credit. The waiver was in proper form except for the tardiness of the Commissioner's signature. The petitioner subsequently on August 9, 1923, filed a claim for refund and credit involving the years 1917–1921 (R. 6), thus requesting an examination of its returns for those years. When more time was required for this work than the first waiver allowed, it seems reasonable to conclude that the Commissioner relied upon the second waiver. The petitioner's claim for credit was allowed, with the result that the petitioner was asked to pay only a small portion of the additional tax for 1917. Having thus benefited by the Commissioner's compliance with its requests, the petitioner appeared to be satisfied for nearly six years, and then attacked the waiver upon which the Commissioner relied in extending to the petitioner the benefit of considering and allowing its claim for credit. In these circumstances the petitioner should not be heard to repudiate the document by which it expressly waived the statute of limitations upon a tax admittedly due. See *Thiel Service Co.* v. *Commissioner,* 50 F. (2d) 173 (C.C.A. 7th); *Liberty Baking Co.* v. *Heiner,* 37 F. (2d) 703 (C.C.A. 3d); *Trustees for Ohio & Big Sandy Coal Co.* v. *Commissioner,* 43 F. (2d) 782, 784 (C.C.A. 4th); see also *Magee* v. *United States,* 282 U.S. 432.

The petitioner argues that there could have been no acceptance of or reliance upon the second

waiver because at the time it was filed, February 19, 1923, the first waiver had not yet been limited in duration since the Commissioner's Mimeograph 3085 (II-1 Cumulative Bulletin 174), setting April 1, 1924, as the expiration date, was not promulgated until April 11, 1923. There are adequate answers to the argument. In the first place the unlimited waiver probably did not extend the period of limitation "forever", as the petitioner states, but only for a reasonable time. *Pictorial Printing Co.* v. *Commissioner,* 38 F. (2d) 563 (C.C.A. 7th); *Frost* v. *Commissioner,* 23 B.T.A. 411, 416; cf. *Big Four Oil & Gas Co.* v. *Heiner,* 57 F. (2d) 29 (C.C.A. 3d); *Greylock Mills* v. *White,* 63 F. (2d) 866, 868 (C.C.A. 1st). If notice of termination is required (see *Greylock Mills* v. *Commissioner,* 31 F. (2d) 655, 658 (C.C.A. 2d), certiorari denied, 280 U.S. 566), we think that the filing of the second waiver could constitute such notice. Cf. *Ethel D. Co.* v. *Commissioner,* 27 B.T.A. 25. Furthermore, the petitioner's argument seems to be based upon the assumption that the Commissioner must have either accepted or refused to accept the waiver between the date it was filed and the date of the issuance of Mimeograph 3085, but no reason is advanced why that assumption is proper. In any event the Commissioner's reliance upon the waiver occurred after the issuance of Mimeograph 3085 when the Commissioner delayed collection and considered the petitioner's claim for refund and credit.

The suggestion that the Commissioner could not have relied upon the waiver because it was his belief that there was no period of limitation upon collection was answered by this Court in *Stange* v. *United States,* 282 U.S. 270, 277:

> That the parties at the time may have believed that collection was possible independent of any waiver, does not make less effective the instrument given for the purpose of tolling the limitation on the ultimate determination and collection of the tax. It must be assumed that an effective and not a futile act was intended.

We further contend that the Commissioner's signature was not essential to the validity of the waiver, and that even if the Commissioner had never signed the waiver, it would still be valid. The Government's argument with respect to the necessity of the Commissioner's signature is fully treated in the Government's brief in *Helvering* v. *U.S. Refractories Corp.,* No. 20, present term. For the reasons stated therein we submit that the Commissioner's signature to the waiver was unnecessary, and, that being so, his failure to sign within any specified time could not affect the validity of the waiver. The decision of the Circuit Court of Appeals for the Third Circuit in that case (64 F. (2d) 69) was affirmed by this Court on October 23, 1933, but by any equally divided court.

Even if this Court should hold that the signature of the Commissioner is essential, we think that in

the circumstances disclosed in this case the requirement of the statute was satisfied without the signature of the Commissioner upon the waiver itself. When the Commissioner on June 26, 1923, signed and certified the additional assessment against the petitioner for 1917, there was on the attached assessment list a notation, opposite the item pertaining to the petitioner, containing the word, "waiver." (R. 6.) The statute requires only that the Commissioner consent in writing (Revenue Act of 1921, Section 250 (d); *infra* p. 23), and it has been held that it is not necessary for the consent of both the taxpayer and the Commissioner to be evidenced upon a single document. *Sabin* v. *United States,* 70 C.Cls. 574; *Eclipse Lawn Mower Co.* v. *United States,* 1 F.Supp. 768 (C.Cls.). No proof was offered as to what waiver the notation on the attached list referred, but we think the court below was correct when it concluded that the word applied to the second waiver, and not to the first. The second waiver was on file at the time the notation was made. Moreover, the first waiver covered only the year 1917, while the second waiver covered both 1917 and 1918, which were the two years involved in the credit.

Assuming that the signature of the Commissioner is essential and that the requirement was not met by the signing and certification of the assessment, discussed above, we do not think it follows that the validity of the waiver must be determined

as of the date when it was signed by the Commissioner rather than the date when it was filed by the taxpayer. There is nothing in the statute or in the nature of a waiver that leads to this conclusion. Section 250 (d) of the Revenue Act of 1921 (*infra*, p. 23), in effect when the petitioner filed the waiver, prescribed no time within which the Commissioner's consent had to be evidenced by his signature; it simply allowed a later collection when both the Commissioner and the taxpayer consented in writing.[3]

We do not understand the petitioner to suggest that the signature of Commissioner Lucas was unauthorized or invalid or rendered the waiver void simply because the waiver was filed during the incumbency of Commissioner Lucas' predecessor in office. The assertion that Commissioner Blair never intended to accept the waiver, even if material, cannot be justified as there is no finding that such was the case.

It has been repeatedly stated by this Court that a waiver is not a contract, but only a voluntary unilateral waiver of a defense by a taxpayer, and that the provision requiring the Commissioner's

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[3] No change in this respect was made in the later acts. Revenue Act of 1924, c. 234, 43 Stat. 253, 300, Sec. 278 (c) (U.S.C., Title 26, Sec. 1060); Revenue Act of 1926, c. 27, 44 Stat. 9, 59, Sec. 278 (c) (U.S.C.App., Title 26, Sec. 1060); Revenue Act of 1928, c. 852, 45 Stat. 791, 870, Sec. 506 (a).

signature was inserted in the statute solely for administrative purposes. *Stange* v. *United States, supra,* p. 276; *Aiken* v. *Burnet,* 282 U.S. 277, 281; *Burnet* v. *Railway Equipment Co.,* 282 U.S. 295, 298–299; see *Florsheim Bros. Co.* v. *United States,* 280 U.S. 453, 466–477. The signature of the Commissioner is a ministerial act not required for the protection of any substantial rights of the taxpayer, and an irregularity in signing does not render the waiver void. See *Stern Bros. & Co.* v. *Burnet,* 51 F. (2d) 1042 (C.C.A. 8th); *Trustees for Ohio & Big Sandy Coal Co.* v. *Commissioner,* 43 F. (2d) 782 (C.C.A. 4th); *Board* v. *Commissioner,* 51 F. (2d) 73 (C.C.A. 6th), certiorari denied, 284 U.S. 658; *L. J. Christopher Co.* v. *Commissioner,* 55 F. (2d) 530 (App. D.C.); *Onandaga* v. *Commissioner,* 50 F. (2d) 397 (C.C.A. 2d), certiorari denied, 284 U.S. 671; *United Thacker Coal Co.* v. *Commissioner,* 46 F. (2d) 231 (C.C.A. 1st); *Greylock Mills* v. *Commissioner,* 31 F. (2d) 655 (C.C.A. 2d), certiorari denied, 280 U.S. 566; *Fleitmann* v. *Commissioner,* 65 F. (2d) 176 (App. D.C.), certiorari denied Oct. 9, 1933, No. 234, present term; *Sabin* v. *United States,* 70 C.Cls. 574, *supra; Eclipse Lawn Mower Co.* v. *United States,* 1 F.Supp. 768 (C. Cls.), *supra.* The failure of the Commissioner to sign within the period of limitation as extended by the waiver is such an irregularity and does not vitiate the waiver. *Mosier* v. *Goodcell,* 49 F. (2d) 391 (S.D. Cal.); see

National Piano Mfg. Co. v. *Commissioner,* 11 B.T.A. 46, affirmed, 50 F (2d) 310 (App. D.C.).

III

THE PETITIONER'S SUIT IS ONE UPON AN ACCOUNT STATED, AND THE ACCOUNT SHOWS NO BALANCE STRUCK IN FAVOR OF THE PETITIONER

Assuming that the petitioner's argument with respect to the validity and effectiveness of the disputed waiver is sound, still we contend that no recovery may be had in this suit. The petitioner acknowledges that this suit is brought upon an account stated, but we think it has failed to establish an account upon which recovery may be based. In this type of case, the account stated, if any exists at all, is found in the certificate of overassessment delivered to the taxpayer. *Bonwit Teller & Co.* v. *United States,* 283 U.S. 258, 265; *Daube* v. *United States,* 289 U.S. 367, 370; *Wm. J. Friday & Co., Inc.,* v. *United States,* 61 F. (2d) 370 (C.C.A. 3d). Liability upon the account is predicated on a balance struck as the result of computation and agreement. *Daube* v. *United States, supra,* p. 370; *Toland* v. *Sprague,* 12 Pet. 300, 335; *Volkening* v. *DeGraaf,* 81 N.Y. 268, 270; *Chace* v. *Trafford,* 116 Mass. 529, 533. A certificate of overassessment was delivered to the petitioner, which noted the overassessment for 1918 sought to be recovered in this suit (R. 7), but because the overassessment had been credited against petitioner's 1917 tax liability there

was no indication in the certificate of an agreement to pay the amount of the overassessment.[4]

There was no balance struck in favor of the petitioner in this certificate and therefore no amount which the Commissioner impliedly promised to pay the petitioner as in an account stated. As to this point the case falls squarely within the rule of two recent decisions of the Court of Claims. *Leisenring* v. *United States,* 3 F.Supp. 853 (C.Cls.); *Earle* v. *United States,* 3 F.Supp. 849 (C.Cls.).

As pointed out by this Court in *Daube* v. *United States, supra,* pp. 372–373, extension of the period of limitation in the revenue laws is opposed to the public interest requiring stability and certainty in the Government revenues, and the ruling in *Bonwit Teller & Co.* v. *United States, supra,* is "not to be extended through an enlargement of the concept of an account stated by latitudinarian construction." We submit that it is only by such enlargement of the principles of account stated that the Commissioner's notation of an overassessment can be construed as containing an implied promise to pay the amount in some other way than the Commissioner indicated upon the same document. In

[4] A certificate of overassessment informs the taxpayer that the "overassessment will be abated, credited, or refunded as indicated below." A copy of the form used for certificates of overassessment is set out in Appendix B (*infra*, pp. 26–27). Where, as in this case, the amount of the overassessment has been credited, the certificate has no entry after the word "Refunded."

the *Bonwit Teller* case this Court had before it only the question whether an action could be brought upon an account stated based upon a certificate of overassessment, after the statute of limitations upon suits under the revenue laws had expired, and no question with respect to the amount of the account was presented to or passed upon by this Court.

CONCLUSION

The credit was properly made since it was made pursuant to the taxpayer's request in its claim for credit. If it is necessary to consider the validity of the second waiver, it was valid and effective to extend the period of collection of the petitioner's 1917 tax. In any event, the petitioner is not entitled to recover upon an account stated.

We submit that the decision below is correct and should be affirmed.

Respectfully submitted.

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FRANK J. WIDEMAN,
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NOVEMBER 1933.

APPENDIX A

Revenue Act of 1921, c. 136, 42 Stat. 227, 265, Sec. 250 (d):

> The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

Revenue Act of 1928, c. 852, 45 Stat. 791, 870, 875:

> SEC. 506. WAIVERS AFTER EXPIRATION OF PERIOD OF LIMITATION.
>
> (a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:
>
> "(c) Where before the expiration of the time prescribed in section 277 for the assess-

ment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period, previously agreed upon."

* * * * *

(b) Section 278 of the Revenue Act of 1926 is further amended by adding at the end thereof a new subdivision to read as follows:

"(f) Any agreement which would be within the provisions of subdivision (c) or (d) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective according to its terms if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929."

(c) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed.

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpay-

ment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U.S.C.Sup. VI, Title 26, Sec. 1670.)

SEC. 609. ERRONEOUS CREDITS.

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608. (U.S.C.Sup. VI, Title 26, Sec. 1675.)

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

APPENDIX B

FORM OF CERTIFICATE OF OVERASSESSMENT

[SEAL] TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER
OF INTERNAL REVENUE,
Washington.

CERTIFICATE OF OVERASSESSMENT

Income Tax Unit
IT:R:CC—

Number:
Allowed:
Schedule No.

An audit of your income tax return, Form and a consideration of all the claims (if any) filed by you for the year ended indicates that the tax assessed for this year was in excess of the amount due:

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You

will be relieved from the payment of any amount abated: if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Respectfully,

Abated: $

Credited: $

Year:

Account No.

Refunded: $

Deputy Commissioner.

By

Head of Division.

U. S. GOVERNMENT PRINTING OFFICE: 1933